

Interlocal Agreement Terms and Conditions for the Transfer of Development Rights

Preliminary Draft Rule – Chapter 365-198 WAC

March 1, 2010

Section 1. Authority and Purpose

- (1) Chapter 43.362 RCW establishes a regional transfer of development rights program in central Puget Sound, including King, Pierce, Kitsap, and Snohomish Counties and the cities and towns within these counties. A transfer of development rights program is a market-based exchange mechanism that encourages the voluntary transfer of development rights from sending areas that a community wants to conserve to receiving areas where growth and the infrastructure to support it are planned.
- (2) The purpose of the regional transfer of development rights program is to foster voluntary county, city, and town participation in the program so that interjurisdictional transfers occur between the counties, cities, and towns, including transfers from counties to cities and towns in other counties. Private transactions between buyers and sellers of transferable development rights are allowed and encouraged under this program.
- (3) The purpose of the rule is to facilitate participation by counties, cities and towns in the regional transfer of development rights program. The purpose of the regional transfer of development rights program is to conserve resource, rural and other land prioritized for conservation and to encourage growth in cities consistent with the state growth management act under Chapter 36.70A RCW.
- (4) The department of commerce is directed by RCW 43.362.050 to develop and adopt by rule terms and conditions of an interlocal agreement for transfers of development rights between counties, cities, and towns. Counties, cities, and towns participating in the regional program have the option of adopting the terms and conditions by reference to transfer development rights across jurisdictional boundaries as an alternative to entering into an interlocal agreement under chapter [39.34](#) RCW.

Section 2. Applicability

- (1) This rule applies to transfers of development rights between King, Pierce, Snohomish and Kitsap Counties and the cities and towns within these counties. The rule only applies to transfers from county-designated sending areas to city or town-designated receiving areas. Transfers of development rights may be between any county and any city within the four-county region. Counties are encouraged to confer with one another regarding cross-county transfers.
- (2) Utilization of this rule for transfers of development rights between King, Pierce, Snohomish and Kitsap Counties and the cities and towns within these counties is optional.
- (3) This section and the rules adopted under this section shall be deemed to provide an alternative method for the implementation of a regional transfer of development rights program, and shall

not be construed as imposing any additional condition upon the exercise of any other powers vested in municipalities.

- (4) Nothing in this chapter prohibits a county, city, or town from entering into an interlocal agreement under chapter [39.34](#) RCW to transfer development rights under the regional program.

Section 3. Policy

- (1) Current concern over the rapid and increasing loss of rural, agricultural, and forested land has led to the exploration of creative approaches to preserving these important lands. The creation of a regional transfer of development rights marketplace will assist in conserving these lands as defined in Section 4 (9) of this chapter.
- (2) It is good public policy to build upon existing transfer of development rights programs, pilot projects, and private initiatives that foster effective use of transferred development rights through the creation of a market-based program that focuses on the central Puget Sound region.
- (3) Participation in a regional transfer of development rights program by counties, cities, and towns should be as simple as possible.
- (4) Implementation of a regional transfer of development rights program is consistent with the goals and policies of chapter 36.70A RCW, the Puget Sound Regional Council's multicounty planning policies adopted under RCW 36.70A.210(7), the Puget Sound Action Agenda adopted under chapter 90.71 RCW, and the state goals for reducing greenhouse gas emissions under chapter 80.80 RCW.

Section 4. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Amenity funding" means funding provided to a receiving city or town for infrastructure or other improvements in a receiving area.
- (2) "By-right permitting" means that project applications for permits that use transferable development rights would be subject to administrative review. Administrative review allows a local planning official to approve a project without noticed public hearings.
- (3) "Department" means the department of commerce.
- (4) "Development rights credit" means the tradable good representing development rights. Credits are purchased and sold, either on the open market or through a bank. For landowners, credits are assigned based on the number of development rights assigned to their property by the county. For developers, credits are based on the receiving area ratio.

(5) "Receiving area ratio" means the number or character of development rights that are assigned to a development right for use in a receiving area. Development rights in a receiving area may be used as provided by the receiving area jurisdiction, including but not limited to additional residential density, additional building height, additional commercial floor area, or to meet regulatory requirements.

(6) "Receiving areas" are lands within and designated by a city or town in which transferable development rights from the regional program established by this chapter may be used.

(7) "Receiving cities and towns" mean the cities and towns that have chosen to participate in the regional transfer of development rights program pursuant to RCW 43.362.060.

(8) "Regional transfer of development rights program" or "regional program" means the regional transfer of development rights program established by RCW [43.362.030](#) in central Puget Sound, including King, Pierce, Kitsap, and Snohomish counties and the cities and towns within these counties.

(9) "Sending area" includes those lands designated by the county as sending areas and that meet conservation criteria as described in RCW [43.362.040](#) as follows:

- a. Land designated as agricultural or forest land of long-term commercial significance;
- b. Land designated rural that is being farmed or managed for forestry;
- c. Land whose conservation meets other state and regionally adopted priorities; and
- d. Land that is in current use as a manufactured/mobile home park as defined in chapter [59.20](#) RCW.

(10) "Sending area ratio" means the number of development rights that a sending area landowner can sell.

(11) "Transfer of development rights" includes methods for protecting land from development by voluntarily removing the development rights from a sending area and transferring them to a receiving area.

(12) "Transfer of development rights bank" means an entity operated by a county or other entity for the purpose of buying, selling, and holding development rights or facilitating private development right transactions.

(13) "Transferable development right" means a right to develop in a sending area that can be sold and transferred for use consistent with:

- (a) A transferring county's adopted program and the regional program, and
 - (b) A receiving ratio adopted by the city or town for development in a designated receiving area.
- (14) "Transferring county" means the county that has agreed to participate in the regional transfer of development rights program pursuant to RCW 42.362.060.

Section 5. Authority of counties and cities to adopt rule provisions by reference

- (1) All counties, cities, and towns eligible to participate in the regional transfer of development rights program under chapter 43.362 RCW are authorized to adopt ordinances or resolutions which incorporate by reference the provisions in section 6 of this chapter in lieu of an interlocal agreement under chapter 39.34 RCW. Upon adoption of the rule provisions by reference by any county and any city or town in the four county region, a transfer of development rights may occur between the adopting county and adopting city or town.
- (2) If a county or city or town chooses to adopt the provisions in section 6 by reference in lieu of an interlocal agreement under chapter 39.34 RCW, the county or city must at a minimum adopt the mandatory provisions in section 6.
- (3) Choosing to adopt the provisions in section 6 by reference in lieu of an interlocal agreement under chapter 39.34 RCW is optional for a county, city or town participating in the regional transfer of development rights program.
- (4) Nothing in this section prohibits a county, city, or town from entering into an interlocal agreement under chapter [39.34](#) RCW to transfer development rights under the regional program.

Section 6. Terms and conditions that may be adopted in lieu of an interlocal agreement

- (1) City and town provisions to be adopted by reference in lieu of an interlocal agreement include:
 - a. In the ordinance or resolution adopting the provisions of this section by reference, a city or town must specifically:
 - i. Upon good faith consultation with the transferring county, designate receiving areas in the city or town within which transferred development rights may be used;
 - ii. Upon good faith consultation with the transferring county, state the receiving area ratio or ratios for the rights to be received;
 - iii. Refer to city or town policies and ordinances that have been adopted for receiving areas; and
 - iv. State the estimated additional build out capacity for development with rights that the city or town has agreed to receive from the transferring county.
 - b. Mandatory provisions that must be adopted if a city or town chooses to adopt the provisions of this section by reference as follows:
 - i. The city or town, in consultation with the transferring county, shall develop a process to notify the county when it has approved the use of development

rights credits in a specific project in the designated receiving area. For purposes of this rule, “approved” occurs at the earlier of (a) issuance by the city or town’s planning department of the first building permit for a project using development rights credits; or (b) a developer’s irrevocable commitment to use the development rights credits for a specific project; and

- ii. The city or town shall identify performance measures for the city or town to report to the transferring county and the department.
- iii. The city or town shall indemnify and hold harmless the transferring county and its officers, agents and employees or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason or arising out of any negligent action or omission of the city or town, its officers, agents, and employees, or any of them, in performing obligations pursuant to this rule. In the event that any suit based upon such a claim, action, loss, or damage is brought against the county, the city or town shall defend the same at its sole cost and expense, provided that the transferring county retains the right to participate in said suit if any principle of governmental or public law is involved; and if final judgment be rendered against the transferring county and its officers, agents, employees, or any of them, or jointly against the city and transferring county and their respective officers, agents, and employees or any of them, the city or town shall satisfy the same.

c. Optional provisions that may be adopted by reference:

- i. The city or town shall identify the sending areas from which the city or county agrees to accept development rights.

(2) County provisions to be adopted by reference in lieu of an interlocal agreement include;

a. Mandatory provisions that must be adopted if a county chooses to adopt the provisions of this section by reference as follows:

- i. The county has adopted policies, regulations and administrative procedures to implement the regional transfer of development rights program, including but not limited to:
 - 1. Facilitation and promotion of the qualification and certification of development rights from properties in the county’s designated sending areas consistent with RCW 43.362.040;
 - 2. Established procedures to facilitate the sale of development rights credits; and
 - 3. Established procedures to require, maintain, and enforce deed restrictions on a sending site from which development rights credits are purchased in order to prohibit those sites from being developed in violation of deed restrictions.

- ii. The county shall notify receiving cities and towns within thirty days of the end of each calendar year the number of available development rights credits remaining in designated receiving areas. If the city or town has identified the sending area or areas from which it has agreed to accept development rights, the notification shall indicate the number of credits remaining in that sending area for the respective city or town. If the county administers a transfer of development rights bank, annual notification of transactions shall be provided.
 - iii. The transferring county shall indemnify and hold harmless the city or town and its officers, agents and employees, or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason or arising out of any negligent action or omission of the transferring county, its officers, agents, and employees, or any of them, in performing obligations pursuant to this rule. In the event that any suit based upon such a claim, action, loss, or damage is brought against the city or town, the transferring county shall defend the same at its sole cost and expense, provided that the city or town retains the right to participate in said suit if any principle of governmental or public law is involved, and if final judgment be rendered against the city or town and its officers, agents, and employees, or any of them, or jointly against the city and county and their respective officers, agents, and employees, or any of them, the county shall satisfy the same.
 - b. Optional provisions that may be adopted if a county chooses to adopt the provisions of this section by reference as follows:
 - i. The county shall establish and operate a transfer of development rights bank to purchase, sell, and hold development rights.
 - ii. Consistent with adopted county appropriations and statutory restrictions, the county shall provide amenity funding to receiving cities or towns.
 - iii. The county shall facilitate private development right transactions between willing sellers and buyers.
- (3) Joint county and city or town provisions that are mandatory and must be adopted by reference by the county and city or town are as follows:
- a. The county and city or town shall establish an evaluation and monitoring program based on quantitative and qualitative performance measures developed by the department for monitoring the regional transfer of development rights program under RCW 43.362.070.
 - b. The dispute resolution process between the county and city or town shall be through mediation. The county and city or town mutually agree to enter into mediation through an agreed upon mediator and process, if agreement cannot be reached regarding interpretation or implementation of any provisions in this rule adopted by reference. The parties shall use the mediation process in good faith to attempt to come to agreement early in the process, and prior to any appeals or litigation that might otherwise be entitled to bring.

- c. The provisions in this rule adopted by reference shall become effective on the date the adopting ordinance or resolution is signed by the responsible county, city or town official.
 - d. The county, city or town may repeal the provisions of this rule adopted by reference upon 180 days' written notice to the other if:
 - i. The city or town's development regulations allowing the use of development rights credits, or the provisions of the county's development regulations allowing transfer of development rights to cities are held invalid by any court of competent jurisdiction in a final judgment no longer subject to appeal; or
 - ii. The county, city or town shall materially default in the performance of the obligations as set forth in provisions of this rule adopted by reference, and shall not cure such default within thirty (30) days' notice after such party's receipt of written notice thereof from the county, city or town, as the case may be. A repeal of the provisions of this rule adopted by reference shall affect the use of development rights credits previously certified by the county for use in the designated receiving area only to the extent provided in city or town development regulations, as the same may be amended. Any repeal of the provisions of this rule adopted by reference shall not affect the county's, city or town's rights or duties with respect to any amenity funds previously provided by the county under the terms hereof, nor the city or town's right to receive county funds for which the city or town shall have satisfied all conditions to disbursement prior to termination. In the event the provisions of this rule are repealed by the county pursuant to subsection (3)(c) of this section because the city or town has modified its development regulations in a manner that prohibits or effectively prohibits the use of development rights credits consistent with the regional transfer of development rights program, and any amenity provided in subsection (2)(b)(ii) of this section have been disbursed to the city or town, the city or town shall refund to the county a percentage of the amenity funds equal to the percentage of the development rights credits that has not been transferred into the designated receiving area pursuant to the regional transfer of development rights program.
 - e. The city or town and the county acknowledge that if the claims, actions, suits, liability, loss, costs, expenses and damages referenced in subsections (1)(a)(iii) and (2)(a)(iii) of this section are caused by or result from the concurrent negligence of the city or town, its agents, employees, and/or officers and the county, its agents, employees, and/or officers, the provisions of this rule adopted by reference shall be valid and enforceable only to the extent of the negligence of each party, its agents, employees and/or officers.
- (4) The department shall provide an ordinance or resolution template for adopting terms and conditions by reference consistent with the provisions of this chapter for use by counties, cities and towns participating in the regional transfer of development rights program.